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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/661,087	09/12/2003	Kent I. Smedley	50534-0400	6599
21611	7590	03/27/2007	EXAMINER	
SNELL & WILMER LLP (OC) 600 ANTON BOULEVARD SUITE 1400 COSTA MESA, CA 92626			CREPEAU, JONATHAN	
			ART UNIT	PAPER NUMBER
			1745	
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		03/27/2007	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/661,087	SMEDLEY ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Jonathan S. Crepeau	1745	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 06 December 2006.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-10 and 34-52 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-10 and 34-52 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Response to Amendment***

1. This Office action addresses claims 1-10, 34-51 and newly added claim 52. The amendments to claims 1 and 41 are sufficient to obviate the rejections over the Gutierrez and Pinto references. However, claims 1-10, 34-37, 40-49 and 52 remain rejected over the Smedley reference for the reasons of record and claims 38, 39, 50, and 51 are newly rejected as necessitated by amendment. Accordingly, this action is made final.

### ***Terminal Disclaimer***

2. The terminal disclaimer filed on December 6, 2006 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent 6,764,588 has been reviewed and is accepted. The terminal disclaimer has been recorded.

### ***Claim Rejections - 35 USC § 102***

3. Claims 1-10, 38, 40-46, 50, and 52 are rejected under 35 U.S.C. 102(e) as being anticipated by Smedley et al (U.S. Patent 6,764,588). In Figure 6 the reference teaches a fluidization apparatus (600), an electrochemical cell stack (602), a fluidization pump (610) and a fluid delivery pump (604). As shown in Figure 5 the apparatus may comprise a spout tube

(redirection tube) (500), a baffle (506), a jet (502), and a feed tube (fluidization tube) (510).

Thus, the instant claims are anticipated.

***Claim Rejections - 35 USC § 103***

4. Claims 34-37, 39, 47-49, and 51 are rejected under 35 U.S.C. 103(a) as being obvious over Smedley et al.

The reference is applied for the reasons stated above. However, the reference does not expressly teach the splitter elements or component diameters as recited in the instant claims.

However, the invention as a whole would have been obvious to one of ordinary skill in the art at the time the invention was made because the artisan would be motivated to use such splitter elements in the apparatus of Smedley et al. These devices are known to function as “sieves” and to prevent the blockage of a conduit. As such, the artisan would be motivated to use a splitter element in the apparatus of Smedley et al.

Furthermore, the diameters recited in claims 39 and 51 are seen as a matter of design choice of the apparatus of Smedley which can be optimized based on the flow rates through the tubes. Accordingly, these limitations are also not considered to distinguish over the reference.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art only under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not an invention “by another”; (2) a showing of a date of

invention for the claimed subject matter of the application which corresponds to subject matter disclosed but not claimed in the reference, prior to the effective U.S. filing date of the reference under 37 CFR 1.131; or (3) an oath or declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the inventor named in the application is the prior inventor under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). This rejection might also be overcome by showing that the reference is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(l)(1) and § 706.02(l)(2).

***Response to Arguments/Declaration***

5. The declarations under 37 CFR 1.132 filed December 12, 2006 are insufficient to overcome the rejection of claims 1-10 and 34-52 based upon the Smedley reference as set forth in the last Office action because the declarations do not indicate the roles of the other inventors of the '588 patent and of the instant application. It is noted that both S. Smedley and K. Smedley declare that they invented the apparatus shown in the '588 patent and claimed in claims 1-10 and 34-52 of the instant application. However, further clarification is required regarding inventors R. Gulino, E. Alger, and J. Rosen of the instant application, R. Alstadt and F. Grochulski of the '588 patent, and D. Novkov, named in both the instant application and the patent. Since the roles of these inventors are not clear, it is submitted that the declared fact that K. Smedley and S. Smedley jointly invented, as the same inventive entity, the subject matter disclosed in the '588

Art Unit: 1745

patent and claimed in the instant application has not been clearly established. Statements to the effect that the other inventors did not contribute to this subject matter would be sufficient to address this issue.

It should also be noted that with regard to the Pinto reference, the declarations are also not persuasive for the following reason: S. Smedley declares that the apparatus of the Pinto reference was invented by him, however, S. Smedley and K. Smedley declare that they jointly invented the subject matter of claims 1-10 and 34-52 of the instant application. Thus, inventorship by the same entity has not been established. However, the amendments made to claims 1 and 41 are deemed sufficient to obviate the rejections over the Pinto reference, thereby rendering consideration of the declarations moot.

### *Conclusion*

6. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, THIS ACTION IS MADE FINAL. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37

CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jonathan Crepeau whose telephone number is (571) 272-1299. The examiner can normally be reached Monday-Friday from 9:30 AM - 6:00 PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patrick Ryan, can be reached at (571) 272-1292. The phone number for the organization where this application or proceeding is assigned is (571) 272-1700. Documents may be faxed to the central fax server at (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Jonathan Crepeau  
Primary Examiner  
Art Unit 1745  
March 22, 2007